No. 76-115

In the Supreme Court of the United States

OCTOBER TERM, 1976

VINCENT J. BERNABEI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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For the third time, petitioner seeks review of his conviction for willful failure to file income tax returns. He renews his contention, first made on direct appeal, that the trial court erred in excluding evidence of his financial and marital problems during the prosecution years.

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of willful failure to file tax returns, in violation of 26 U.S.C. 7203. The trial court sentenced him to a prison term of four years, four months of which were to be served in a jail-type institution and the remainder suspended in favor of probation. Petitioner was also fined $20,000. The court of appeals affirmed petitioner's conviction (473 F. 2d 1385), and this Court denied certiorari (414 U.S. 825). Petitioner thereupon moved in the district court for a new

trial. On appeal from the denial of his motion, the court of appeals dismissed the appeal and this Court denied certiorari (Pet. App. 1a; 423 U.S. 837). Petitioner thereupon commenced this proceeding for review of his conviction under 28 U.S.C. 2255, and the court of appeals reaffirmed his conviction by order (Pet. App. 1a-2a).

The government's proof at trial showed that petitioner, an attorney, realized gross income of $30,557 in 1965, $25,206 in 1966, $30,126 in 1967, and $31,903 in 1968 (Tr. 95-97),[1] and that he filed no income tax returns for those years (Tr. 230-231). Petitioner admitted that he knew during the prosecution years that he was required to file the returns but testified that the reason he did not file the returns was that he did not have the money to pay the tax (Tr. 223, 230, 237). Petitioner further admitted during the investigation that he knew the returns could have been filed without paying the taxes due and that he had advised the Treasury agents that he did not do so because he wanted to avoid tax liens (Tr. 172).

Petitioner was also asked, on direct examination by his counsel, about certain financial transactions occurring prior to the prosecution years (R. 28).[2] Upon objection by the government, petitioner's counsel asserted that he intended to develop testimony respecting "a series of financial difficulties and a series of marital difficulties" (R. 29). The trial judge asked how these difficulties were material, and petitioner's counsel replied only that the "financial pressures, pressures of creditors * * * reflect on the lack of any evil motive" (*ibid.*). The court then ruled (R. 33):

[1]"Tr." refers to the trial transcript.

[2]"R." refers to the record appendix filed in the court of appeals.

> * * * a lack of funds or an inability to pay does not constitute reasonable cause for failure to file declarations or estimates of tax returns. Therefore, any evidence relative to inability to pay or lack of funds will be excluded.

Petitioner contends that the trial court erred in rejecting his offer of proof. We note at the outset that petitioner's collateral attack upon evidentiary rulings at his trial does not present a claim cognizable upon collateral attack of his conviction. See *Davis* v. *United States*, 417 U.S. 333, 346.

In any event, his offer of proof was irrelevant to the issue of willfulness in the context of this case. Willfulness, under the tax misdemeanor and felony statutes, consists of "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360. Although evidence of inability to pay might possibly be relevant to willfulness in cases where a defendant established that he had a good faith belief that he could not lawfully file without paying the tax (see *Yarborough* v. *United States*, 230 F. 2d 56 (C.A. 4), certiorari denied, 351 U.S. 969), petitioner made no such claim. To the contrary, petitioner conceded knowledge of a legal duty to file and admitted deliberately failing to file merely in order to avoid paying the tax.

Similarly, evidence of emotional distress engendered by marital difficulties might be relevant to a defense based upon inadvertence or negligence (see *United States* v. *Gorman*, 393 F. 2d 209 (C.A. 7), certiorari denied, 393 U.S. 832), but petitioner never relied upon or suggested such a defense at trial. In the absence of such a defense, evidence of emotional distress is irrelevant and may be excluded. *United States* v. *Haseltine*, 419 F. 2d 579 (C.A. 9).

United States v. *Bishop, supra,* does not support petitioner's claim. The holding of *Bishop,* so far as relevant here, is that the word "willful" as used in tax misdemeanor statutes has the same meaning as the same word used in tax felony statutes, *i.e.,* a "voluntary, intentional violation of a known legal duty" (412 U.S. at 360). As for the phrases "bad faith or evil intent," the Court in *Bishop* made it clear that they refer to nothing more than the bad purpose or evil motive that necessarily inheres in an intentional violation of a known legal duty.[3] Thus, proof of deliberate wrongdoing is all that is required. *United States* v. *McCorkle,* 511 F. 2d 482, 485 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 826; *United States* v. *Pohlman,* 522 F. 2d 974 (C.A. 8) (*en banc*), certiorari denied, 423 U.S. 1049; *United States* v. *Hawk,* 497 F. 2d 365, 368 (C.A. 9), certiorari denied, 419 U.S. 838. *United States* v. *Bengimina,* 499 F. 2d 117 (C.A. 8), relied upon by petitioner (Pet. 4), is likewise inapposite. There the court held that an instruction equating "careless disregard" with "willfulness" was reversible error. There was, however, no such instruction given by the district court in this case.[4]

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[3]In distinguishing *Bishop* from this case on its facts (Pet. App. 2a), the court of appeals correctly observed that there is nothing in *Bishop* which permits the introduction of evidence of inability to pay the tax in a failure to file prosecution. Contrary to petitioner's assertion (Pet. 5), the court did not hold that the *Bishop* standard of willfulness is inapplicable in a failure to file case.

[4]The district court charged the jury that "willfully" meant "deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew he should have filed" (Tr. 333). However, it did not instruct the jury that " '[g]ood motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.' " Accordingly, this case does not implicate the question presented in our petition for certiorari in *United States* v. *Pomponio,* 528 F. 2d 247, 249 (C.A. 4), petition for a writ of certiorari pending, No. 75-1667.

For the reasons stated, the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

DOJ-1976-09